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IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

JOHN SANTOSKY II and ANNIE SANTOSKY,
Petitioners,

vs.

BERNHARDT S. KRAMER, COMMISSIONER ULSTER COUNTY DEPARTMENT OF SOCIAL SERVICES,
Respondents.l

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

BRIEF FOR RESPONDENT-INTERVENORS, MR. AND MRS. JOHN BALOGH, FOSTER PARENTS FOR THE CHILD JED SANTOSKY

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QUESTION PRESENTED

Whether New York's statutory provisions governing the transfer and commitment of custody and guardianship of children in foster care, particularly its permanent neglect proceedings, requiring proof by a fair preponderance of evidence, violates Due Process?

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STATEMENT OF THE CASE

The infant subjects of this appeal are: Tina Apel, born April 15, 1971, John Santosky, born August 22, 1973 and Jed Santosky, born August 19, 1974. Petitioners are their natural parents. Tina was removed from petitioners' custody on November 20, 1973 when she was two and one-half years of age and placed by the respondent Ulster County Department of Social Services in a foster home. John was also removed from petitioners' custody on August 19, 1974 only a few days before his first birthday and placed in a foster home. Jed was placed in his first and only foster home directly from the hospital when he was only five days old. All of them were court placed due to parental neglect.

Jed has resided with Mr. and Mrs. Balogh, Respondents-Intervenors, his first and only foster family since placement to date.

Mr. and Mrs. Balogh have provided Jed with excellent care and nurturance, indeed this is the only home and family he has ever known. Mr. and Mrs. Balogh have regularly appeared before Ulster County Family Court and participated in the permanent neglect proceeding and appeals therefrom.

The children's initial removal from petitioners' care and initial placement in foster care was ordered by the Ulster County Family Court after bifurcated hearings[1] in accordance with article 10 of the Family Court Act of New York. Their initial placement was for eighteen months, the maximum initial period permitted by the statute. Thereafter the Family Court annually reviewed and extended the children's foster care placements pursuant to F.C.A. §1055.

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1. New York's Child Protective Statute requires an initial fact-finding proceeding (F.C.A. §1044) to determine if state intervention is warranted and a separate dispositional hearing (F.C.A. §1045) to determine if the children's safety requires placement out of the home.

Under New York's statutory scheme both the petitioners (if indigent) were entitled[2] to and availed themselves of, assigned legal counsel and likewise, the children,[3] were assigned a law guardian to provide them with independent legal representation at each and every stage of the neglect proceedings.

New York's provision for counsel is also applicable to custody and guardianship proceedings pursuant to section 384-b of the Social Services Law of New York, the so-called termination proceedings. The standard of proof required by New York statutory scheme, a fair preponderance of the evidence, is the same for both the neglect and abuse proceedings and termination proceedings.[4]

These children were again before the Ulster County Family Court in September, 1976 when the respondent petitioned the court pursuant to Article Six of the Family Court Act, New York's permanent neglect statute. The Court (ELWYN, J.) held *inter alia* that the respondent failed to establish by a preponderance of the evidence that petitioners had failed to plan for the children's future care. See, *Matter of Santosky*, 89 Misc. 2d 70 (Family Ct., Ulster Co., 1977), aff'd sub. nom. *Matter of John W.*, 63 A.D.2d 750 (3rd Dept. 1973).

Two years later in October, 1978, the children were once again the subject of judicial inquiry when respondent brought a second permanent neglect proceeding. The Court (ELWYN, J.) on March 12, 1979 after four days of fact-finding determined that the petitioners had permanently neglected these children by

2. F.C.A. §262.

3. F.C.A. §249.

4. New York imposes the preponderance of the evidence standard in virtually all judicial proceedings involving foster care placement of children.

reason of their failure to plan for their future care. On April 5, 1979 a separate dispositional hearing was held at the conclusion of which custody and guardianship of the children was transferred from the petitioners and committed to the respondent for the purpose of adoption. Testimony from Dr. Sportman, the child psychiatrist, was uncontradicted as to Jed. He was found to be a gifted child of superior intellect with no diagnosed phobias. It was further found that Jed was an integral member of the Balogh foster family. It is from this determination that petitioners appeal.

SUMMARY OF ARGUMENT

The decision and determination of the Ulster County Family Court that adoption of Jed Santosky by the foster family with whom he has lived for the past seven years was not made in derogation of the Constitutional rights of the petitioners. New York's statutory provisions to protect and promote the best interests of the defenseless children are fundamentally fair. New York's evidentiary provisions properly balance the competing private interests at stake, namely the parents, the children and their *de facto* parents, the foster parents, with important government interests.

The petitioners claim that Due Process requires a higher standard of proof than a fair preponderance of the evidences ignore the paramount interest at stake. It is premised upon a Constitutional right to "family life" which emphasize blood ties rather than existing relationships. It is really a claim of parents which would relegate children to chattel status, a posture long rejected by this Court. New York has gone to great lengths to insure that the interests of its defenseless children are given paramount consideration. New York's statutory provisions governing the intervention by the State in the family cannot be weighed piecemeal. We deal here with child protective proceedings, with the obligations of parents and a child's right to nor-

mal family life once removed from neglectful parents' care and placed in foster care.

The State has not caused a break-up of an existing family unit. Instead, the State has interceded to protect a defenseless child from parents who have failed to act as parents. There is no existing family unit which the Court has irrevocably severed. The State here has simply given recognition to Jed's new *family* which has resulted from the failure of the parents to fulfill clear parental obligations, in particular by their failure to make any provisions or plan for the child's future well-being over an extended period of years. Indeed, they never even sought to terminate the placement of the children, thus leaving Jed in limbo since 1974.

We submit that New York's requirement of proof by a fair preponderance of the evidence in guardianship proceedings correctly recognizes the paramount interest of the child to a loving stable home, strikes a proper balance amount competing interests and when considered in light of all the statutory safeguards governing foster care does not present an undue risk that an erroneous termination of parental rights will occur.

ARGUMENT

NEW YORK'S STATUTORY PROVISIONS GOVERNING THE TRANSFER AND COMMITMENT OF THE CUSTODY AND GUARDIANSHIP OF CHILDREN IN FOSTER CARE, PARTICULARLY ITS PERMANENT NEGLECT PROCEEDINGS REQUIRING PROOF BY A FAIR PREPONDERANCE OF THE EVIDENCE, ARE FUNDAMENTALLY FAIR AND DO NOT OFFEND DUE PROCESS.

New York has created a progressive and enlightened statutory scheme designed to promote and protect the welfare and well-being of its dependent, neglected and abused children of which the permanent neglect proceedings here under attack are but one facet. The Legislature's intent was to provide a solution to the situation created where the parent of a child in foster care fails to act as a parent but nonetheless refuses to consent to the child's adoption. In passing on this statute New York's Supreme Court, Appellate Division noted in *Matter of Klug*, 32 A.D.2d 915 (1st Dept. 1969):

> "The emphasis of the statute was not on the rights of natural parents, but on the plight of thousands of forsaken children whose parents had abandoned their responsibilities of care and support. A parent who has failed in her obligation to maintain, care for, protect and plan for the future well being of her child, has forfeited her parental rights. The welfare of the child is still the primary and paramount concern of the Court."
>
> *Klug*, at 916.

This Court on many occasions, and most recently, in *Lassiter v. Dept. of Soc. Services*, 49 U.S.L.W. (1981), has instructed that

> "For all its consequence, 'due process' has never been, and perhaps can never be precisely defined. Unlike some legal rules', this Court has said, due process i.e. is

> not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895. Rather, the phrase expresses the requirements of '*fundamental fairness*', a requirement whose meaning can be as opaque as its importance is lofty. *Applying the Due Process clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.*"
>
> *Lassiter,* id at 4587

With these instructions in mind we turn first to the paramount interest at stake: the interest of the children.

A.

We agree with petitioners that the family holds a position of great importance in our society. We acknowledge, too, that the integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment. *Stanley v. Illinois,* 405 U.S. 645, 651 (1972). However, we could not disagree more strongly with petitioners' central premise that the Constitution recognizes and protects only the biological family and a child's blood ties. Where, as here, the natural family unit has long been supplanted by a foster family unit due to parental unfitness, New York's statutory provisions to terminate permanently the nominal biological ties in recognition of the child's *de facto* family are fundamentally fair.

This Court has previously recognized that blood relationships are not the only relationships worthy of the Constitution's protection. The foster parent and foster child ties have been acknowledged by the Court as comparable with the biological tie. In *Smith v. OFFER,* 431 U.S. 843 (1977) it was noted at 845:

> "[But] biological relationships are not exclusive determination of the existence of a family. The basic foundation of the family in our society, the marriage relationship, is of course not a matter of blood relation . . . . ,

[T]he importance of the family relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] in a way of life' through the instruction of children, *Wisconsin v. Yoder,* 406 U.S. 205, 231-33 (1972), as well as from the fact of blood relationship. *No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of a blood relationship."* (emphasis added)

Petitioners proceed on the erroneous and somewhat chauvinistic premise that their liberty interest in maintaining family integrity is superior to, or synonomous with the children's interest. Their error is further compounded by their failure to recognize that once the biological family integrity has been dissolved and the children displaced due to parental neglect, as here, the children's liberty interest becomes distinct and separate from the parents. Given the risk of harm to the children if returned to the biological parents' care, the children's interests are equal to, if not superior to, the interests of the parents.

The petitioners' unfitness and the very real risk of danger they present to the children's physical, emotional and mental health and well being was previously determined by the Ulster County Family Court and the State's intervention fully justified. This petitioners concede as well they must. Thus, the dissolution of the family was occasioned not by the State but by the petitioners' transgressions. Likewise, the continued separation of the children from the petitioners has been annually determined and ordered by the Family Court.

The children's interests after they have been removed from the admittedly neglectful parents changes considerably. Their interests, though seemingly basic, must now be of paramount importance if they are to grow to maturity as healthy contributing members of society. Their needs are for the physical and emotional nurturance the petitioners did not and cannot provide.

New York recognizes the need for such nurturance and for stability for such children who are unable to live with their natural family. See, e.g. §384-b(1)(b). Social Services Law.

Experts in the child care field concur. Goldstein, Freud and Solnit, in their most recent study "BEFORE THE BEST INTERESTS OF THE CHILD," state:

> "We propose the following periods during which a child is in the direct and continuous care of the same adult(s) as maximum intervals *beyond which it would be unreasonable* to presume that a child's residual ties with his absent parents are more significant than those that have developed between him and his longtime caretakers:
>
> (a) 12 months for a child up to the age of 3 years at the time of placement.
>
> (b) 24 months for a child from the age of 3 years at the time of placement."
>
> Page 46
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> * * *
>
> "Even if his biological parents were ideal, even if they were in all ways superior to the Appletons, and even if the state were in error in its initial decision to place Tom in foster care or to leave him there for more than a temporary period, Tom should never have been used to remedy those mistakes or as an award for damages.* What was once intended to be a "temporary" placement had become permanent. *The relationship between Tom and the Appletons deserved recognition and should have been treated with the same finality as the traditional placement of a child with his biological parents. Only in that way could the court have given credibility to its announced policy to favor family unity* and judicial "restraint in removing a child from its parents except under the most unusual conditions." (emphasis added)
>
> Page 57

The petitioners' interest which they claim the statute infringes by its lesser burden of proof is, the interest to maintain the children in the limbo of foster care. They seek to maintain the facade of a family though no family unit remains.

Thus, the interests of the children in foster care to stability and continuity of loving care must take precedence over the claimed parental interest of maintaining the bonds of family which have long since been broken.

The State's interest is coextensive with the child's. New York seeks to end the limbo of foster care for those children who cannot return to the natural parents and who have established lasting loving ties to their foster parents who are willing to give them a permanent homelife. The intent of the New York State Legislature is stated as follows (New York State Social Services Law §384-b):

"It is the intent of the legislature in enacting this section to provide procedures not only assuring that the rights of the natural parent are protected, but also, where positive, nurturing parent-child relationships no longer exist, furthering the best interests, needs, and rights of the child by terminating parental rights and freeing the child for adoption."

B.

The fair preponderance of the evidence standard of proof imposed by New York seeks to balance these competing interests.

The Supreme Court Appellate Division, Third Department stated in upholding this standard of proof from which this appeal has been taken:

> "In adhering to our decision, we note that the permanent neglect statute (Social Services Law, §384-b; Family Ct. Act §611, et. seq.) recognizes and seeks to balance rights possessed by the child (see Social Services Law, §384-b, subd. 1; *Matter of Bennett v. Jeffreys*, 40 N.Y.2d 543, 546, 547) with those of natural parents (see Social Services Law, §384-b, subd. 1; *Matter of Sanjivini K.*, 47 N.Y.2d 374, 382; *Matter of Corey L. v. Martin L.*, 45 N.Y.2d 383, 392" *Matter of Santosky*, 76 A.D.2d 837 (3rd Dept. 1980).

It would be violative of the rights of the foster child who after years in a foster home has no *meaningful* relationship with his or her neglectful biological parent to require a greater degree of proof in order to formally recognize the *family relationship* with his foster parents. The adoption by the legislature of New York of the preponderance of the evidence standard assures that the scales are not weighed against the child and in favor of his unfit natural parents.

We believe that the Arizona Court of Appeals in *Hernandez v. State ex rel Arizona Dept. of Econ. Sec.*, 23 Ariz. App. 32, 530 P 2d 389 (1975) succinctly sets forth the very real risk a higher standard of proof presents:

> 'In a termination proceedings an error in factual determination can result in the termination of the parental relationship when such termination is not justified. *On the other hand it can result in the failure to terminate when the relationship should be ended . . . . a child as a result of a factual error, would be forced to return to a hostile, if not dangerous, family situation or spend his childhood in a series of temporary foster homes.* Comparing the social utilities of these two erroneous outcomes, we do not believe that one can make a fundamental value determination that the erroneous severance of parental rights, vis-a-vis the erroneous failure to sever, constitutionally requires a higher burden of proof." 530 P 2d at 393. (empahsis added)

We believe where, as here, the petitioners have been previously adjudged unfit parents by the Family Court and their separation from the children annually reviewed and continued by the Family Court, a balancing test is both logical and necessarily fair.

C.

In assessing the risk that the procedures used will lead to erroneous results, the Court must consider the entire statutory scheme created by New York to protect the rights of children. The permanent neglect requires not for one but two separate and distinct hearings. §622 and 623 Fam. Ct. Act. At each stage counsel is statutorily required for the indigent parent §262 Fam. Ct. Act. Moreover, the appointment of law guardian for the child is mandatory. §249 Fam. Ct. Act.

The resources of the Court frequently utilized include the Bureau of Mental Health Services for psychiatric and psychological evaluations and independent evaluations of the parties by probation. N.Y.C.R R. §2506.2. Special provisions are also available for prompt appellate review. Article 11, Fam. Ct. Act.

Moreover, once having been placed in foster care, New York requires an annual review of placement under Section 1055 of the Fam. Ct. Act for those children who have been adjudged neglected or abused. For dependent children voluntarily placed in foster care, New York requires Court approval of the initial placement (Section 358 of the Social Services Law) and periodic review every eighteen months by the Famnily Court. See, Section 392 of the Social Services Law.

Here, petitioners' longstanding neglections has been fully chronicled by the Court. The oldest child was placed in 1973. The other two boys have been in placement since September, 1974. This placement has been continuous. There have been at least several reviews pursuant to Section 1055 of the Fam. Ct. Act as well as a prior termination proceeding. Thus, the Court has scrutinized the petitioners and children on at least five occasions prior to the commencement of this permanent neglect proceeding.

With all of these safeguards, and this plethora of legal proceedings, it is difficult to see how petitioners can contend that they have been denied due process. The imposition of a higher standard of proof will only serve to increase the risk that

neglected children, such as these, will remain in the limbo of foster care, unable to return to the biological parents due to their unfitness and yet unable to enjoy the permanency of a loving stable home environment. This result this Court cannot countenance.

Finally, we would note certain emotionally laden charges, leveled by petitioners. Here, the petitioners, although indigent, have always had the same counsel since at least the time Jed came into care in 1974. The children have always been represented by a law guardian (the same attorney who has represented them in the Section 1055 Fam. Ct. Act reviews as well as throughout the permanent neglect proceedings).

Petitioners contend that termination proceedings are particularly vulnerable to cultural and class bias. While it might be true that many natural parents with children in the foster care system are indigent, they are entitled to free legal representation at all stages of the proceedings. Petitioners' inference that indigent natural parents receive less than adequate legal representation in these proceedings would come as quite a shock to the highly skilled lawyers from the various publicly funded law offices such as Mobilization for Youth or Community Action for Legal Services who have filed an *amicus curiae* brief with this Court.

The Appellate Divisions of the New York State Supreme Court (First and Second Judicial Departments) also require that assigned counsel first be approved by screening panels. Additionally, proficiency in Family Court proceedings is required.

Likewise petitioners' contention that respondent have endless financial resources to prosecute these proceedings simply ignore the budgetary restraints and fiscal realities confronting foster care agencies. They ignore too the fact that these proceedings can also be brought by foster parents whose funds are likewise limited. See, §392(7)(c) Social Services Law.

The natural parents' attorney can also utilize a court ordered psychiatric/psychological examinations and independent investigations at no expense by the Office of Probation.

See, N.Y.C.R.R. §2506.2 Unifom Fam. Ct. Rules. These are services offered by the Court.

Finally we would note that upholding New York's statutory provisions requiring proof by a fair preponderance of the evidence will simply give legal recognition to a family unit which has been in existence since 1974. A result not unlike that reached by this Court in *Quillon v. Walcott*, 434 U.S. 246 (1978):

> "But this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. *Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence a result desired by all concerned, except appellant.*" (emphasis added) *Quillon* at 246

CONCLUSION

For the reasons stated herein, respondent-intervenors pray that the judgment and order of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department be affirmed.

Respectfully submitted,

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APPENDIX A

Family Court Act

§1055. Placement.

(a) For purposes of section one thousand fifty-two the court may place the child in the custody of a relative or other suitable person, or of the commissioner of social services or of such other officer, board or department as may be authorized to receive children as public charges, or a duly authorized association, agency, society or in an institution suitable for the placement of a child.

(b)(i) Placements under this section may be for an initial period of eighteen months and the court in its discretion may at the expiration of that period, upon a hearing, make successive extensions for additional periods of one year each. The place in which or the person with whom the child has been placed under this section shall submit a report at the end of the initial period of placement, and at the end of the period of a placement extension, making recommendations and giving such supporting data as is appropriate.

(ii) No placement shall be extended or continued pursuant to this subdivision except upon a hearing held concerning the need for extending or continuing the placement. Such hearing shall be held upon the court's own motion or upon the motion of the person, agency or institution with whom the child was placed or of the foster parent or parents in whose home the child resided during the period of placement.

* * *

(d) In addition to or in lieu of an order of extension or continuation of a placement made pursuant to subdivision (b), the court may make an order directing a social services official or other duly authorized agency to institute a proceeding to legally

free the child for adoption, if the court finds reasonable cause to believe that grounds therefor exist. Upon a failure by such official or agency to institute such a proceeding within ninety days after entry of such order, the court shall permit the foster parent or parents in whose home the child resides to institute such a proceeding unless the social services official or other duly authorized agency caring for the child, for good cause shown and upon due notice to all parties to the proceeding, has obtained a modification or extension of such order, or unless the court has reasonable cause to believe that such foster parent or parents would not obtain approval of their petition to adopt the child in a subsequent adoption proceeding.

Social Services Law

§392. Foster care status; periodic family court review.

1. As used in this section, unless otherwise expressly stated or unless the context requires a different interpretation,

(a) "foster care" shall mean care provided a child in a foster family free or boarding home, group home, agency boarding home, child care institution, health care facility or any combination thereof;

(b) "child" shall mean a child under the age of eighteen years for whom an authorized agency is providing foster care, except a child who is in the care of an authorized agency pursuant to court order under article seven or ten of the family court act.

2. Where a child has remained in foster care for a continuous period of eighteen months a petition to review the foster care status of such child together with a copy, if any, of the placement instrument:

(a) shall be filed in the family court by the authorized agency charged with the care and custody or the guardianship and custody of such child;

(b) may be filed by another authorized agency having the supervision of such foster care;

(c) may be filed by the foster parent or parents in whose home the child resides or has resided during such period of eighteen months.

* * *

3. Such petition:

(a) shall be filed in the family court in the county in which the authorized agency charged with the care and custody or the guardianship and custody of such child has its principal office or where the child resides;

(b) shall set forth the disposition sought and the grounds therefor;

(c) shall, when filed by an authorized agency and notice is to be given to a parent, guardian or relative of the child, omit, for good cause shown, the name and address of the foster parent or parents with whom such child is residing at the time of the filing of the petition and the name and address of the biological parent or parents and, in lieu thereof, there shall be filed with such petition a verified schedule executed by such agency setting forth the name and address of such foster or biological parent or parents.

4. Notice of the hearing, including a statement of the dispositional alternatives of the court, shall be given and a copy of the petition shall be served upon the following, each of whom shall be a party entitled to participate in the proceeding:

(a) the authorized agency charged with the care and custody or the guardianship and custody of such child, if such authorized agency is not the petitioner;

(b) the authorized agency having supervision of such foster care, if such authorized agency is not the petitioner;

(c) the foster parent or parents in whose home the child resided or resides at or after the expiration of a continuous period of eighteen months in foster care;

(d) the child's parent or guardian who transferred the care and custody of such child temporarily to an authorized agency;

(e) a person to whom a parent entrusted the care of the child, where such person transferred the care of the child to an authorized agency;

(f) such other persons as the court may, in its discretion, direct.

5. Unless the court grants an order to show cause to be served in lieu of a notice of the hearing and the petition, service of notice of the hearing and the petition shall be made at least twenty days before the date of said hearing in such manner and on such notice as the court may, in its discretion prescribe; provided, however, that where the court prescribes service by mail, such service shall be made by registered mail or certified mail, return receipt requested. If service cannot be made in the manner prescribed by the court, the court may prescribe an alternative method of service.

* * *

7. At the conclusion of such hearing, the court shall, upon the proof adduced, in accordance with the best interest of the child, enter an order of disposition:

(a) directing that foster care of the child be continued; or

(b) in the case of a child whose care and custody have been transferred temporarily to an authorized agency directing that the child be returned to the parent, guardian or relative; or

(c) in the case of a child whose care and custody have been transferred temporarily to an authorized agency directing any agency specified in subdivision four of this section to institute a proceeding, pursuant to section three hundred eighty-four-b of this chapter to legally free such child for adoption, if the court finds reasonable cause to believe that grounds therefor exist. Upon a failure by such agency to institute such a proceeding within ninety days after entry of such order, the courts shall permit the foster parent or parents in whose home the child resides to institute such a proceeding unless the agency, for good cause shown and upon due notice to all parties to the proceeding, has obtained a modification or extension of such order, or unless the court has reasonable cause to believe that such foster parent

or parents would not obtain approval of their petition to adopt the child in a subsequent adoption proceeding or

* * *

9. The court may make an order directing an authorized agency to undertake diligent efforts to encourage and strengthen the parental relationship when it finds such efforts will not be detrimental to the best interests of the child. Such order may include a specific plan of action for the authorized agency including, without limitation, requirements that such agency assist the parent in obtaining adequate housing, employment, counselling, medical care or psychiatric treatment.

10. The court shall possess continuing jurisdiction in proceedings under this section and, in the case of children who are continued in foster care, shall rehear the matter whenever it deems necessary or desirable, or upon petition by any party entitled to notice in proceedings under this section, but at least every twenty-four months.

* * *

Family Court Act

§249. Appointment of law guardian.

(a) In a proceeding under articles seven or ten of this act or under section three hundred eighty-four-b of the social services law, or when a minor is sought to be placed in protective custody under section one hundred fifty-eight of this chapter, the family court shall appoint a law guardian to represent a minor who is the subject of the proceeding or who is sought to be placed in protective custody, if independent legal representation is not available to such minor. . . .

* * *

§262. Assignment of counsel for indigent persons.

(a) Each of the persons described below in this subdivision has the right to the assistance of counsel. When such person first appears in court, the judge shall advise such person before

proceeding that he has the right to be represented by counsel of his own choosing, of his right to have an adjournment to confer with counsel, and of his right to have counsel assigned by the court in any case where he is financially unable to obtain the same:

(i) the respondent in any proceeding under article ten of this act;

(ii) the respondent in any proceeding under article eight of this act;

(iii) the respondent in any proceeding under part three of article six of this act;

(iv) the parent, foster parent, or other person having physical or legal custody of the child in any proceeding under section three hundred fifty-eight-a, three hundred eighty-four, three hundred eighty-four-b, or three hundred ninety-two of the social services law;

* * *